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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ABUCHAIBE HNOS. LTDA.,

Petitioner,

V.

UNITED STATES OF AMERICA
and
BANCO ATLANTICO,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER DUE THE SECOND CIRCUIT'S FAILURE TO GIVE EFFECT TO THE EXPANDED AMENDED DEFINITION OF "INTERCEPT" AND "DEVICE," WHICH CONGRESS SPECIFICALLY ENACTED TO PROTECT ELECTRONIC COMMUNICATIONS IN THE ELECTRONIC COMMUNICATION PRIVACY ACT OF 1986, 18 U.S.C. § 2510(4) AND (5), THE SECOND CIRCUIT ERRED WHEN IT USED THE LIMITED 1968 DEFINITION OF ONLY "INTERCEPT," TO CONDONE THE USE OF THE VERBAL ORDERS FROM TWO NON-SENIOR LEVEL EMPLOYEES OF THE UNITED STATES, WHO DIRECTED THE PROGRAMMING OF "STOP QUES" IN BANCO ATLANTICO'S COMPUTER MODEM DEVICE TO INTERCEPT AND THEN DISCLOSE ALL ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT TO THE REPUBLIC OF COLOMBIA?

II. WHETHER THE SECOND CIRCUIT ERRED IN FAILING TO COMPLY WITH 18 U.S.C. § 2518(9), SO TO EXCLUDE THE ADMISSION INTO EVIDENCE OF ALL THE ELECTRONIC COMMUNICATIONS OBTAINED BY THE UNITED STATES WITHOUT EITHER JUDICIAL AUTHORITY UNDER 18 U.S.C. § 2516(3), OR WARRANTS ISSUED UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE UNDER 28 U.S.C. § 2703(a)?

III. WHETHER THE SECOND CIRCUIT ERRED IN NOT EXCLUDING THE ADMISSION INTO EVIDENCE OF ALL THE ELECTRONIC COMMUNICATIONS OBTAINED BY THE UNITED STATES THROUGH THE GENERAL IN REM WARRANTS, AND GENERAL DEA

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IV. WHETHER THE LOWER COURTS ERRED IN FAILING TO SEPARATE ABUCHAIBE FROM THE OTHER CLAIMANTS FROM THE REPUBLIC OF COLOMBIA, IN FAILING TO TRACE THE ELECTRONIC COMMUNICATION TO ANY ILLEGAL SOURCE OR ACTIVITY, AND IN FAILING TO COMPLY WITH THE EIGHTH AMENDMENT AND THIS COURT'S HOLDING IN AUSTIN?

V. WHETHER UNDER 18 U.S.C. § 2520, ABUCHAIBE HNOS. LTDA. HAS STATED A CLAIM FOR DAMAGES FOR VIOLATION OF 18 U.S.C. § 2516(3), DUE TO THE ADMITTED PROGRAMMING OF "STOP QUES" IN BANCO ATLANTICO'S COMPUTER MODEM DEVICE WHILE IT PROVIDED A COMMUNICATION SERVICE TO THE PUBLIC, SO TO PERMIT WITHOUT A JUDICIAL ORDER ISSUED IN ACCORDANCE WITH 18 U.S.C. § 2518, THE UNITED STATES ACCESS TO ALL ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT TO THE REPUBLIC OF COLOMBIA?

VI. WHETHER UNDER 18 U.S.C. § 2707, ABUCHAIBE HNOS. LTDA. HAS STATED A CLAIM FOR DAMAGES BECAUSE WITHOUT A WARRANT ISSUED UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE REQUIRED UNDER 18 U.S.C. § 2703(a), THEIR ELECTRONIC COMMUNICATIONS IN COMPUTER STORAGE WERE ADMITTEDLY DISCLOSED TO THE UNITED STATES?

VII. WHETHER ABUCHAIBE HNOS. LTDA. HAS STATED A CLAIM FOR DAMAGES UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978, 12 U.S.C. § 3403(a), BECAUSE OF THE UNAUTHORIZED DISCLOSURE OF THEIR FINANCIAL INFORMATION STORED IN "STOP QUE" ACCOUNTS?

LIST OF PARTIES

In accordance Rule 11 and Rule 12.2 of the Rules of the Supreme Court of the United States, this petition seeks review on a writ of certiorari to the United States Court of Appeals for the Second Circuit of:

(i) the Second Circuit's final decision in United States v. Merrill Lynch Bank, ___ F. 2d. ___, Docket No. 92-6229 (September 10, 1993); and,

(ii) the related pending appeal in the Second Circuit in Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F. Supp. 180 (February 27, 199-2), 2nd Cir. No. 92-7360.

The parties that have appeared in these two cases included those listed on the case caption.

As to the former of these actions it is a Government initiated civil forfeiture case, the parties below also included Organizacion JD Ltda., Manufacturas JD Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturas del Atlantico Ltda., Comercial Samora Ltda., Manufacturas Internacionales Ltda., Industrias Marathon Ltda., Manufacturas de Moda Ltda; Incolco Ltda; Creaciones Karen Ltda; Tote Export Manufacturas Ltda; Creaciones Ivonne Ltda.; Confecciones Zuny Ltda., and Valery Fashions Ltda.

Abuchaibe Hnos. Ltda. has neither parent companies nor subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

First, in United States v. Merrill Lynch Bank, 801 F.Supp 984 (1992), ___ F. 2d. ___, Docket No. 92-6229 (September 10, 1993) (hereinafter "All Funds

Case")(App. 1b)[1], where a final decision is rendered, Petitioner Abuchaibe Hnos. Ltda's (hereinafter "Abuchaibe")[2] prays that a writ of certiorari be issued to review the judgement of the United States Court of Appeals for the Second Circuit. In the alternative, an Order should be issued vacating the Second Circuit's decision and ordering reconsideration in light of the provisions of the Electronic Communications Privacy Act and the Right to Financial Privacy Act, as well as this Courts holding in Austin v. United States.

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[1]"App. " references are to the section and page number in the Appendix. "Lod. " references are to the page number in the Lodging filed and submitted with this Petition.

[2]The Limited Partnership is owned by one person, to fabricate and export finished clothing from Barranquilla, Republic of Colombia. It is incorporated under that Civil Code of the Republic, and has never conducted any commercial activity in the United States.

Second, based on the Second Circuit's refusal to comply with the Stipulation of the parties and reinstate the pending appeal of the judgement of the United States District Court for the Eastern District of New York in Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F. Supp. 180 (February 27, 1992), appeal pending, 2nd Cir. Docket No. 92-7360 (hereinafter the "Consolidated Bank Cases")(App. 1d), Abuchaibe prays that a writ of certiorari be issued to review this pending appeal with the All Funds Case.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District in the All Funds Case at App. 1a, is reported at 801 F. Supp. 984 (E.D.N.Y).

The opinion of the Court of Appeals in the All Funds Case, not yet reported, is reproduced in the separately bonded appendix to this petition at App. 1b.

The Order Denying the Petition for Rehearing dated October 6, 1993, is reproduced at App. 1c.

The opinion of the United States District Court for the Eastern District in the Consolidated Bank Case, at App. 1d, is reported at 792 F. Supp. 180 (1992) appeal pending.

STATEMENT OF JURISDICTION

The Second Circuit issued its opinion in the All Funds Case on September 10, 1993. It denied a petition for rehearing on October 6, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

In the Consolidated Bank Cases, where no judgment has been issued, and all motions to reinstate in accordance with a Stipulation have been denied, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and § 2101(e).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

THE FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

THE EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

18 U.S.C. § 2510:

(4) "intercept" means the aural or other acquisition of the contents of any . . . electronic . . . communication through the use of any electronic, mechanical, or other device;

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a . . . electronic communication . . . .

(12) "electronic communication" means any transfer of . . . intelligence of any nature transmitted in whole or in part by wire . . . that affects interstate or foreign commerce, ...

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive . . . electronic communication.

(17) "electronic storage" means-

(A) any temporary, intermediate storage of a . . . electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; . . .

18 U.S.C. § 2511(1)(a):

(1) Except as otherwise specifically provided in this chapter any person who-

(a) intentionally intercepts,. . . , or procures any other person to intercept . . . , any . . . electronic communication;

(b) intentionally discloses, . . . to any person the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through interception of . . . electronic communication in violation of this subsection . . . shall be punished as in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511(3)(a):

Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

18 U.S.C. § 2516(3):

Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure)

may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, or order authorizing or approving the interception of electronic communication by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of any Federal felony.

18 U.S.C. § 2518(9):

The contents of any . . . electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal of State court unless each party, not less than ten days before trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. . . .

18 U.S.C. § 2520:

(a) **In general.**-Except as provided in section 2511(2)(a)(ii), any person whose . . . electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief may be appropriate.

18 U.S.C. § 2702(a):

Prohibitions.- Except as provided in subsection (b)-(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service;. . .

18 U.S.C. § 2703:

REQUIREMENTS OF GOVERNMENT ACCESS.

(a) **Contents of electronic communications in electronic storage.**- A Government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication, that is in electronic storage in an electronic communication system for one hundred and eighty days or less, only pursuant to a warrant issued under the Federal Rules of Criminal Procedures or equivalent State warrant. A government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) **Contents of electronic communications in a remote computing service.**- (1) A government entity may require a provider of remote computing service to disclose the contents of any electronic communication to which this paragraph is made applicable by paragraph (2) of this section-

> (A) without required notice to the subscriber or customer, if the government entity obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant; or
>
> (B) with prior notice from the government entity to the subscriber or customer if the government entity-
>
> (i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or
>
> (ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

18 U.S.C. § 2707:

> (a) **Cause of action-** Except as provided in section 2703(e), any . . . customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

12 U.S.C. § 3401:

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name.

12 U.S.C. § 3403:

(a) Release of records by financial institutions prohibited

No financial institution, or officer, employee, or agent or a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter.

STATEMENT OF THE CASE

A. JURISDICTION BELOW

The United States brought the civil forfeiture All Funds Case in New York pursuant to 18 U.S.C. 981, invoking the rules of admiralty codified in the Supplemental Rules of Civil Procedure. Abuchaibe filed a claim under Rule C(6), and, among other things moved to dismiss because the res was an electronic communication not subject to in rem process as a result of the Electronic Communication Privacy Act. The District Court rejected Abuchaibe's jurisdictional objection, and based on a jury verdict found the electronic communication forfeitable.

In both the All Funds Case and the Consolidated Bank Cases, Abuchaibe filed claims for damages based upon the provi-

sions of 18 U.S.C. § 2510(9)(a), § 2520, and § 2710(c)(1); 12 U.S.C. § 3416; 28 U.S.C. § 1332(a)(1), § 2201 and § 2202. The District Court denied the claims for damages based on the relation back doctrine.

Appellate jurisdiction is invoked pursuant to 28 U.S.C. 1291.

B. RELEVANT FACTS

On July 13, 1990, Assistant United States Attorneys for the Eastern District of New York, Mr. Arthur P. Hui and Mr. Gary R. Brown (hereinafter Messrs. Hui and Brown), ordered the distribution of copies of a general civil in rem warrant and complaint to all intermediary

banks[3] in the greater New York area, including Banco Atlantico.

This general warrant sought only the seizure of a bank account at Merrill Lynch in Columbus Ohio, and did not mention Abuchaibe, or any other electronic fund transfer going to the Republic of Colombia (Lod. 1).

On July 17, 1990, Messrs. Hui and Brown, issued verbal telephone orders to the Banco Atlantico to procure their collaboration as a provider of an electronic communication service within the Fedwire, SWIFT, and CHIPS electronic

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[3]All domestic and international electronic fund transfer communication must pass through a sender bank, various intermediary banks, and a beneficiary bank. They all are providing an "electronic communication service" 18 U.S.C. § 2510(15), to the public, as part of the FEDWIRE, SWIFT, and CHIPS, world-wide electronic communication fund transfer systems. This public service is of great domestic and international importance, as indicated by the fact that daily electronic fund transfers amount to over 1 trillion dollars are being transferred world-wide.

communication systems, so on behalf of the United States perform general searches of all electronic fund communications to the Republic of Colombia, regardless of the intended beneficiary.

Based on these verbal instructions of Messrs. Hui and Brown, Banco Atlantico admitted to knowingly inserting "stop ques" in their computer communication modem devices so to intercept[4] all electronic funds transfer communications in transit to any third party beneficiary in the Republic of Colombia.

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[4]Although the term "freeze," was used by both the Intermediary Banks in their explanation of their handling of the electronic communication, and by the Second Circuit in their decision in the All Funds Case; research of the term "freeze," confirms that it has no meaning in the context of electronic communication technology.

Based on the admitted facts that there were repeated procuring of access to electronic communications in transit through the programming of "stop ques" in the Intermediary Banks modem devices, the requirements of the amended definition of "intercept" in 18 U.S.C. 2510(4) were satisfied. See 18 U.S.C. 2510(5).

Once the programmed "stop ques" had intercepted the electronic communications, and the messages were placed in computer storage, Banco Atlantico knowingly failed to comply with the instruction contained in the electronic fund transfer communication.

Thereafter based only on the verbal orders two electronic communications transferring $200,000.00, on July 17, 1990 (Lod. 2), and $54,070.00 on July 18, 1990 (Lod. 3), to Abuchaibe were intercepted at Banco Atlantico.

These in transit electronic communication were placed in computer storage at Banco Atlantico, and then disclosed to Messrs. Hui and Brown.

On July 31, 1990, two weeks after the procuring of the interception of these electronic communication based

only on the verbal order of Messrs. Hui and Brown, a Sixth Amended In Rem Complaint in which Abuchaibe was captioned, was executed on Banco Atlantico (Lod. 4).

Abuchaibe filed both a verified claim for its funds, and claims against the United States for the unauthorized interception of the electronic communication, and disclosure of electronic communication information.

In June, 1991, under the authority of the Right to Financial Privacy Act of 1978, Banco Atlantico applied for and was compensated for its costs relating to its collaboration with the United States.

On July 18, 1991, Abuchaibe filed a claim against Banco Atlantico.[5]

From November, 1990, through March, 1992, during attempted discovery of the United States and the Banco Atlantico in the All Funds Case, Judge Weinstein first granted to the United States an ex parte stay from all discovery for over eight months; and then when the stay was lifted, denied discovery of both the United States, and Banco Atlantico.[6]

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[5]The Consolidated Bank Cases, was originally filed as ten separate actions in the Southern District of New York based on the transmit date of each distinct electronic communication belonging to Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturas del Atlantico Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Manufacturas Internacionales Ltda. and Industrias Marathon Ltda. Although motions in opposition were filed, the cases were consolidated and transferred to Judge Weinstein. Based on the relation back doctrine Judge Weinstein denied all discovery on the collaboration between Banco Atlantico and the United States.

[6]Since all discovery was denied, the exact number of electronic communications intercepted in transit to the Republic of Colombia is not

On February 22, 1992, after having also barred all discovery in the Consolidated Bank Cases Judge Weinstein granted Banco Atlantico its Motion for Summary Judgment.[7]

On March 3, 1992, one day before the start of the two month jury trial in the All Funds Case, based on his holding in the Consolidated Bank Cases, Judge Weinstein dismissed the claims against the United States.

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known. However, it is known that contrary to the regulations of the Federal Reserve, and the agreement entered into to be a part of the FEDWIRE, SWIFT and CHIPS electronic communication systems, Banco Atlantico neither notified the sender, the Federal Reserve, the beneficiary bank, nor any third party beneficiaries in the Republic of Colombia, that they would not comply with the instructions contained in the intercepted electronic communications.

[7]The claim for violation under the Electronic Communications Privacy Act was dismissed based on the relation-back doctrine. The claim under Right to Financial Privacy Act, was dismissed because the Court found, although permitting no discovery on the issue, that no "account" was held in the name of Abuchaibe as the intended beneficiary.

In both the All Funds Case and the Consolidated Bank Cases, Judge Weinstein refused repeatedly all request that the United States produce the judicial authorization for the interception of Abuchaibe's electronic communication pursuant to 18 U.S.C. § 2518(9).

In the All Funds Case, ten day before trial based on the failure of the United States to produce the judicial authorization to intercept the electronic communication, Abuchaibe moved to exclude as admissible evidence the electronic communication and all evidence derived there from in accordance with 18 U.S.C. § 2518(9).

REASONS FOR GRANTING THE WRIT

I. **THE SECOND CIRCUIT ERRED IN THE ALL FUNDS CASE BY INTENTIONALLY FAILING TO REVIEW THE ADMITTED UNAUTHORIZED DISCLOSURE OF ELECTRONIC COMMUNICATIONS IN TRANSIT AND COMPUTER STORAGE, AND IN USING THE OLD 1968 DEFINITION OF "INTERCEPT" AND "DEVICE" TO HOLD THAT THE PROGRAMMING OF "STOP QUES" IN COMPUTER MODEMS DEVICES DID NOT CONSTITUTE "INTERCEPT," AND THUS PROTECTIONS IN THE ELECTRONIC COMMUNICATION PRIVACY ACT OF 1986 DID NOT APPLY.**

Prior to 1986, Congress and others were concerned that modern communication modes, and their future development, such as electronic fund transfers and other computer messaging, might be constitutionally less confidential than older methods.

There were three possible Fourth Amendment arguments advanced to justify warrantless searches of computer messages, or records thereof, under the con-

trol of a third-party computer service provider:

1. The user disclosed their messages to the third party, as the customer in United States v. Miller, 425 U.S. 435 (1976), who disclosed his financial information to the bank, and thereby assumed the risk that the third party would disclose them to the government.

2. The third party's ability to access the user's messages deprived the user of any legitimate expectation of privacy, as happened in Smith v. Maryland, 442 U.S. 735 (1979).

3. The third party has power to consent to a search because it has "concurrent authority" over the records, as happened in United States v. Matlock, 415 U.S. 164 (1974).

To specifically clarify the existence of and limits to the confidentiality rights of electronic messages, Congress amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq., by enacting the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq., and §§ 2701 et seq.

This precise legislation was enacted to prevent the interception "or other acquisition,"[8] of the contents of electronic funds transfer communications,[9]

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[8]Prior to the 1986, the term "intercept" was limited to "aural acquisition," but with the enactment of amended 18 U.S.C. § 2510(4), Congress obtained a "fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement." House Report at p. 19.

[9]An "electronic funds transfer communications" is the transmittal of financial information between banks via computer or other electronic messages. Because Fedwire, CHIPS, and SWIFT systems are communication service providers, electronic funds transfers in transit and storage on these systems are protected communications under 18 U.S.C. § 2516(3), and § 2703(a).

and to clarify the existence of and limits to the confidentiality rights of these electronic messages in transit and computer storage, vis-a-vis the Government and an electronic communication service provider.[10]

The amendments accomplish the following:[11]

See also House Report at p. 23.

[10]"The purpose of the legislation is to . . . to prohibit the interception of certain electronic communications; to provide procedures for the interception of electronic communications by federal law enforcement officers; to provide procedures for access to communications records by federal law enforcement officers; to provide procedures for federal law enforcement access to electronically stored communications; and to ease certain procedural requirements for interception of wire communications by federal law enforcement officers." House Report, at p.16.

"In the absence of market discipline, there is no presumption that the government will strike an appropriate balance between disclosure and confidentiality. And the enormous power of the government makes potential consequences of its snooping far more ominous than those of . . .private individual or firm."Id. at p. 19.

[11]In short the Electronic Communications Privacy Act, mooted arguments (1) and (2) above (insofar as they pertain to private messages in transit and short term records thereof) but left

i. they expand the definition of the term "intercept" to include the obtaining access of electronic communication. 18 U.S.C. § 2510(4).

ii. they expand the definition of the term "device" to include any device or apparatus that could intercept an electronic communication. 18 U.S. C. § 2510(5).

iii. they prohibit the intentional and unauthorized interception of an electronic communication in transmission, and the knowing disclosure or use of a communication so intercepted. 18 U.S.C. § 2511(1)(a) and (c);

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number (3) largely intact, if certain requirements were met. See Chapter 19, Confidentiality and Control of Data, at p. 361 to p. 386, of Benjamin Wright, The Law of Electronic Commerce EDI, Fax, and E-mail: Technology, Proof, and Liability, November, 1991, Little, Brown and Company; See also Note, Search Warrants and Computer Records, 67 B.U.L. Rev. 179 (1987).

iv. they prohibit a communications service provider from intentionally and illegitimately disclosing an electronic communication in transmission. 18 U.S.C. § 2511(3)(a);[12]

v. they prohibit access by both the federal and state governments to stored electronic messages and service providers transactional records. 18 U.S.C. §§ 2703(a); and

vi. they prohibit the unauthorized access to stored electronic communications. 18 U.S.C. § 2702(a).

Turning to the All Funds Case decision, in complete disregard of these specific protection the Second Circuit denied Abuchaibe's claim for damages

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[12]Under the Federal Communications Act of 1934, 47 U.S.C. § 605 (1988), the ability of a communication service provider from divulging messages is also prohibited.

based on it applying the limited old 1968 definition of "intercept" and "device," and intentionally not using the expanded 1986 amended definition in 18 U.S.C. § 2510(4) and (5), so to approve of the use of verbal orders issued by low level Department of Justice employees,[13] to procure the interception and disclosure of Abuchaibe's in transit electronic communication.

Thus in this manner the Second Circuit held that interception did not occur despite the admitted programming

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[13]In 1986, the Department of Justice, wrote to Congress to confirm that it agreed that for three years following enactment, it would require that the same senior level of authority as in 18 U.S.C. § 2516(1) (i.e. Deputy Assistant Attorney General of Criminal Division or higher), be required to seek judicial authority to access electronic communication in transit under 18 U.S.C. § 2516(3). Furthermore, the Department of Justice promised to provide 90 days notice to Congress of any change in this regulation. Senate Report at p. 3682 ; House Report at p. 51.

of "stop ques" in Banco Atlantico's computer modem devices.[14]

More interestingly, as well as far more troubling, was the Second Circuit's total ignoring of the specific Congressional prohibitions against "disclosure" contained in 18 U.S.C. § 2511(1)(a), (c), and (3)(a); § 2702(a).

By ignoring these and other statutory prohibitions, the Second Circuit assumed away the admitted use of only the verbal order issued by the two low level employees of the United States to acquire access to Abuchaibe's electronic

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[14]A `modem,' (modulator/demodulator), has been defined as ". . . a device used to permit communications between computers at different sites, or between a computer and remote terminal, by converting binary digital computer data into analog signals which can pass over telephone lines. Rixon, Inc. v. Racal-Milgo, Inc., D.C. Del, 551 F.Supp. 163, 169." Vol 27, Words and Phrases, Permanent Edition, West Pub. 1989 Supp. Thus under 18 U.S.C. § 2510(5), a device was used by the Intermediary Banks at the request of the United States.

communication stored in Banco Atlantico's computer storage for less than 180 days, in violation of 18 U.S.C. § 2516(3), and § 2703(a)[15].

Therefor the Second Circuit decision in the All Funds Case, is in error and must be reversed because:

First, by focusing on the old limited 1968 definition of the term "intercepts," and "device," the Second Circuit intentionally disregarded the new expanded 1986 definition which Congress specifically enacted to restrict the procuring of the interception of electronic communication in this new age of computer technology. 18 U.S.C. § 2510(4) and (5);

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[15]Under 18 U.S.C. § 2703(a), access Abuchaibe's electronic funds transfer communication could only be obtained through a judicial warrant issued under the Federal Rules of Criminal Procedure.

Second, the Second Circuit totally ignored the admitted facts that based only on verbal order, and without any judicial authority as required by 18 U.S.C. § 2516(3) and the regulations of the Department of Justice, or a warrant issued under the Federal Rules of Criminal Procedure, 18 U.S.C. § 2703(a), "stop ques' were programmed by Banco Atlantico in their computer modem devices to monitor and acquire access to all electronic fund transfer communications going to the Republic of Colombia.

Third, Second Circuit totally ignored the prohibition in 18 U.S.C. § 2511(1)(a), against one who "procures any other person to intercept" an electronic communication;

Fourth, the Second Circuit totally ignored the prohibition against a person

or entity who "intentionally discloses, to any person the contents of any electronic communication" in 18 U.S.C. § 2511(1)(c);

Fifth, the Second Circuit totally ignored the statutory prohibition against "a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication" in 18 U.S.C. § 2511 (3)(a); and,

Sixth, totally ignored the statutory prohibition against an "entity providing an electronic communication service to the public [who] knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service," 18 U.S.C. § 2702(a).

II. IN THE ALL FUNDS CASE BOTH JUDGE WEINSTEIN AND THE SECOND CIRCUIT ERRED IN ADMITTING INTO EVIDENCE THE UNAUTHORIZED INTERCEPTED AND DISCLOSED ELECTRONIC FUND TRANSFER ADVICE WITHOUT COMPLYING WITH 18 U.S.C. § 2518(9).

Despite repeated motions to seek from the United States the judicial authority it had for the interception and disclosure of Abuchaibe's electronic communication, Judge Weinstein refused to comply with the mandates in 18 U.S.C. § 2518(9), and confirm that the United States had judicial authorization to intercept the electronic communication in transit, and to obtain the disclosure of the electronic communication in computer storage, based on the relation back doctrine.

Thus since Judge Weinstein failed to comply with the 18 U.S.C. § 2518(9), the Second Circuit should have held that

all the electronic communications obtained without judicial authority under 18 U.S.C. § 2516(3) and 18 U.S.C. § 2703(a), were inadmissable as evidence.

Because these Congressional statutes were not complied with, the finding that Abuchaibe's electronic communication was forfeitable must be reversed.

III. THE IN REM WARRANT OF JULY 13, 1990, WAS A PROHIBITED GENERAL WARRANT WHICH VIOLATED THE FOURTH AMENDMENT, THUS THE INTERCEPTED AND DISCLOSED ELECTRONIC COMMUNICATION SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE.

In Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971), reh. denied., 404 U.S. 874, this Court noted:

> Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.

Similarly, in Maryland v. Garrison, 480 U.S. 79, 94 L.Ed. 72, 107 S.Ct. 1013 (1987), the Court held that, "[t]he manifest purpose of this particular requirement was to prevent general searches." Id. at 480 U.S. 84.

In this case on July 13, 1990, so to permit Messrs. Hui and Brown to rummage through every third party electronic funds transfer going to the Republic of Colombia, an overbroad general in rem warrant issued to Banco Atlantico, with verbal order to stop by the use of "stop ques" these electronic communications.

Thus the general in rem warrant of July 13, 1993, was in violation of the Fourth Amendment, and damages should be allowed.

In Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967),

this Court held that the New York State wiretapping statute was overbroad and therefore violated the Fourth Amendment because:

> [T]he statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations . . . . As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. . . . Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. . . . Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statutes's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures. Id. at 388 U.S. 58-60

Each of these abuses were employed to stop the electronic communication of Abuchaibe:

a. the communication stopped by the programming of "stop ques" were not described in the July 13, 1990 in rem warrant;[16]

b. the search of Banco Atlantico computer storage of electronic funds transfers covered the period of over 180 days, from January, 1990 through September, 1990;

c. Messrs. Hui and Brown had "full discretion" as to which electronic fund transfer to permit Banco Atlantico to transmit.

This use of the July 13, 1990, in rem warrant cannot be permitted, and in addition to excluding any evidence obtained by the general warrant, damages,

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[16]Abuchaibe Hnos. Ltda. was named for the first time in the in rem warrant executed two weeks later on July 31, 1990. The fund seized was never "described with particularity."

including cost and attorney fees should be awarded.

IV. THE SECOND CIRCUIT DISCRIMINATED AGAINST ABUCHAIBE BY COMBINING THE APPEAL OF ALL THE CLAIMANTS IN THE ALL FUNDS CASE AND FAILING TO TRACE THE SPECIFIC ELECTRONIC COMMUNICATION TO ANY ILLEGAL DRUG TRANSACTION OR DRUG MONEY LAUNDERING TRANSACTION.

The Supreme Court has held, that "[conspiracy] proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass." Kotteakos v. United States, 328 U.S. 750 at 733, 66 S.Ct. 1239 (1966). Where evidence as to some conspirators spills over against another, all cannot be tried together. United States v. Camiel, 689 F.2d 31, 39 (3rd Cir. 1982). See United States v. Bertolotti, 529 F.2d 149, 156 (2d Cir. 1975).

Despite this Judge Weinstein refused repeated motions in the All Funds Case for separate the trails by the different groups of claimants; and the Second Circuit automatically combined the different group of claimants separately filed Notice of Appeals.

However, it is apparent from the numerous errors of facts in both Judge Weinstein's and the Second Circuit's decision that Abuchaibe has been prejudiced by evidence presented by and against claimants Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashion Ltda., Creaciones Karen, Ltda., Tote Export Manufacturas Ltda., and Creaciones Ivonne Ltda. (the "Barranquilla Claim-

ants"),[17] and the sheer force of numbers of the transmitted and intercepted electronic communication apparently rendered the task of separation impossible for the lower courts, and spill over inevitable occurred.

Furthermore, the Second Circuit erroneously states that the United States established probable cause and presented evidence at trial that the source of the intercepted electronic fund transfer belonging to Abuchaibe was connected to the illegal drug transac-

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[17]The Second Circuit discriminated against Abuchaibe by ascribing the following testimony presented in the defense of the Barranquilla Claimants:

"The claimants tried to show that the monies were the legitimate profits from the sales of clothing made in Colombia and Panama. They claimed that massive shipments of clothing were handed over to ship captains who toured the Caribbean island, trading some for produce, livestock, and currency, losing some in transit, having some stolen, and finally disposing of the remainder of the shipment through charitable means." App. p. 17b.

tions and money-laundering activities of the Cali cartel, a Colombian conglomerate headed by Jose Santacruz Londono.

The United States never presented any evidence to show that the specific intercepted electronic fund transfer came from any traceable illegal source.

The facts demonstrated through a tracing analysis of each individual electronic fund transfers intercepted, and later seized, that they neither were the traceable proceeds of illegal drug activity nor were they traceable to any drug money laundering transactions, but came from specific sources that the United States investigated and failed to present any culpable evidence.

In today's climate of public attitude in the United State against Colombian citizens, and Colombia, the Second

Court must be required to take extra precautions against discriminatory over spilling of evidence presented in this large conspiracy case.

Thus for the reason that the United States failed to meet its burden of tracing, and the numerous errors of fact in the opinion of the Second Circuit in the All Funds Case must be reversed.

V. THE FORFEITING OF THE ABUCHAIBE'S ELECTRONIC FUNDS TRANSFER BECAUSE IT WAS DERIVED FROM THE WORLD WIDE PARALLEL CURRENCY MARKET IS A PENALTY THAT IS BOTH DISPROPORTIONATE AND EXCESSIVE IN VIOLATION OF THE EIGHTH AMENDMENT AND AUSTIN.

The Second Circuit decision in the All Funds Case, directly conflicts with the decisions of this Court in Austin v. United States, 509 U.S. , decided June 28, 1993, 61 LW 4811 (June 29, 1993) (hereinafter "Austin"). See also Alexander v. United States, 509 U.S. , de-

cided June 28, 1993, 61 LW 4796 (June 29, 1993).

In the instant action the United States is attempting to implement its new policy regarding the "war on illegal drugs" by seeking to punish Abuchaibe, although innocent of any crime, because the funds relating to the electronic funds transfers intercepted, and seized came from the world wide parallel currency market, which the United States contend contains an unknown percentage of proceeds from illegal drug traffic.

Based on Austin, this is in violation of the Eighth Amendment.

In Austin, a North Dakota man had lost his car-repair business and his mobile trailer after selling two grams of cocaine to an undercover agent. The Government had disputed the contention

of the defendant, Richard Lyle Austin, that the seizure under a civil forfeiture law had violated the "excessive fines" clause.

The Government maintained that Federal laws that gave it the authority to take Mr. Austin's home and business were remedial because they were intended to permit the removal of tools of the drug trade. It also said the seizure was a proper way of repaying the Government for the expenses of law enforcement.

The Court's unanimous opinion in Austin, found that the Eighth Amendment applied to both civil and criminal proceedings and that the forfeiture laws had been intended at least to punish the property owner, and as such fell under the Eighth Amendment.

"The purpose of the Eighth Amendment, . . . , was to limit the government's power to punish. . . . The Excessive Fines Clause limits the government's power to extract payment, whether in cash or in kind, `as punishment' for some offense. . . . (citation omitted) `The notion of punishment, as we commonly understand it, cuts across the division between civil and the criminal law.' United States v. Halper, 490 U.S. 435, 477-448.. . . `It is commonly understood that civil proceedings may advance punitive and remedial goals, and conversely, that both punitive and remedial goals may be served by criminal penalties." Austin at 4813.

"In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We however, must determine that it can only be explained as serving in part to punish. We said in Halper that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to under stand the term." (emphasis added) Austin 4813.[18]

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[18]Black's Law Dictionary, Sixth Edition, at p. 1294:

"Our cases also have recognized that statutory in rem forfeiture imposes punishment." Austin at 4814.

As a noted above as the new policy in its war on illegal drugs the United States has determined to focus on the funds allegedly relating to narcotics trafficking. To this end the United States has determined to investigate all funds going to the Republic of Colombia, from whatever source, and punish those who use the parallel currency market.

However, in the instant action to forfeit the electronic fund transfer of Abuchaibe based on the fiction that the

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"Remedial laws or statute. . . . The underlying test to be applied in determining whether a statute is penal or remedial is whether it primarily seeks to impose an arbitrary, deterring punishment upon any who might commit a wrong against the public by a violation of the requirements of the statute, or whether the purpose is to measure and define the damages which may accrue to an individual or class of individuals, as just and reasonable compensation for a possible loss having a causal connection with the breach of the legal obligation owing under the statute to such individual or class."

electronic funds transfer was guilty of some wrong since they came from the world wide parallel market, is disproportionate and an excessive fine in violation of the Eighth Amendment and the holding in Austin.[19]

VI. THE SECOND CIRCUIT ERRED IN THE ALL FUNDS CASE DECISION, AND IN ITS DECISION TO NOT REINSTATE THE CONSOLIDATED BANK CASES, IN FAILING TO GRANT DAMAGES FOR THE UNAUTHORIZED PROGRAMMING OF "STOP QUES" IN COMPUTER MODEMS DEVICES AND FOR THE UNAUTHORIZED DISCLOSURE OF ELECTRONIC COMMUNICATION IN COMPUTER STORAGE.

The Second Circuit's decision to not reinstate the Consolidated Bank Cases, and its decision in the All Funds

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[19]It is also a violation of the Fifth Amendment due process clause to forfeit the property of Abuchaibe Hnos Ltda., as a truly innocent owner. See Austin p. 4815, footnote 10. It is important to note for the Court that the United States obtained an eight month stay on discovery based on its ex parte presentation that criminal indictments were involved. Abuchaibe has never been accused of any crime or indicted.

Case, are in direct conflict with mandates of Congress regarding the protection of "electronic communications" in transit and in computer storage, by the granting of the award of damages.[20]

In support of their motion to dismiss under Rule 12(b)(6), the United State and Banco Atlantico admitted that between July 16, 1990, and August 8, 1990, Messrs. Hui and Brown, without any judicial authority required under 18

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[20]Senator Pat Leahy wrote to the then Attorney General on the issue of the protection of information in electronic communication. See Electronics Communications Privacy Act of 1986, Senate Report No. 99-541, October 17, 1986, p. 3557 (hereinafter "Senate Report"). See also Electronic Communication Privacy Act of 1986, House Report No. 99-647, June 19, 1986, Committee on the Judiciary, 99th Congress (hereinafter "House Report").

The Senate Report, p. 3555, states, "[t]he Electronic Communications Privacy Act amends title III of the Omnibus Crime Control and Safe Streets Act of 1968-the Federal wiretap law-to protect against the unauthorized interception of electronic communications. The bill amends the 1968 law to update and clarify Federal privacy protection and standards in light of dramatic changes in new computer and telecommunications technologies."

U.S.C. § 2516(3) and § 2703(a), did instruct Banco Atlantico to:

(i) program "stop ques" in their computer modem devices, and not to comply with any accepted wire transfer instructions contained in any wire transfer going to the Republic of Colombia;

(ii) permit repeated unauthorized disclosure of accepted wire transfer instructions in transit to the Republic of Colombia, and in computer storage; and,

(iii) place into a "stop que" account at their respective banks the information related to intercepted wire transfer communications.

Despite these admissions of programming of "stop ques," and the repeated "disclosure" of electronic communica-

tion information by Banco Atlantico,[21] the Second Circuit in the All Funds Case, denied Abuchaibe claim for damages.

However from the admitted facts liability of the United States and Banco Atlantico exists because they did exactly what was specifically prohibited.

Consequently, because of the importance of the issues involved given the admissions of the United States and Intermediary Bank, the Second Circuit's decision in the All Funds Case, and its not issuing a decision in the Consolidated Bank Cases, the Court is requested

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[21]The Senate Report at p. 3580. stated that, ". . . the Electronic Communications Privacy Act amends existing section 2520 of title 18 of the United States Code to incorporate violations involving . . . , **disclosure** . . . of . . . electronic communications.

to exercise its power of supervision to consider the Consolidated Bank Cases.

Deviation from the normal appellate process in the Consolidated Bank Cases is warranted because Abuchaibe's motion to reinstate their appeal was denied on October 14, 1993, by the Second Circuit pending the exhausting of any appeal to the Supreme Court in the All Funds Case, although both the All Funds Case (App. 1b) and United States v. 92 Buena Vista Avenue, 113 S.Ct 1126 (1993) (hereinafter "92 Buena Vista Avenue"), overruled Judge Jack B. Weinstein's use of the relation back doctrine to bar a claim against the United States for violations of the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq. and § 2701 et seq.

Therefore because the repeated denying of Abuchaibe's right to reinstate the Consolidated Bank Cases effectively reconfirms the holding in the All Funds Case, Abuchaibe prays a writ of certiorari be issued so that this Court can provide discretionary supervisory review of these legal issues of such imperative public importance for which Congress enacted precise legislation requiring the exclusion of evidence obtained without the judicial authority under 18 U.S.C. § 2516(3), and a warrant issued under the Federal Rules of Criminal Procedure under 18 U.S.C. § 2793(a), and the permitting of a claim for damages for the unauthorized procuring of the access to electronic communication in transit, and unauthorized

disclosure of electronic communication in computer storage.

It is for these reasons that this Petition presents issues of imperative public importance so that deviation from normal appellate practice is required to review both the All Funds Case final decision, with the pending appeal in the Consolidated Bank Cases.

VII. REVIEW BY THIS COURT IS SOUGHT BECAUSE THE SECOND CIRCUIT'S DECISION IN THE ALL FUNDS CASE, AND ITS FAILURE TO REINSTATE THE CONSOLIDATED BANK CASES, HAVE DENIED ABUCHAIBE THEIR RIGHT TO RECEIVE DAMAGES UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978.

Banco Atlantico has admitted that it had placed the funds relating to each intercepted electronic funds transfer in an account in the name of a beneficiary.

Also Banco Atlantico does admit to being compensated by the United States under the provisions of the Right to

Financial Privacy Act, for the expenses they incurred in their collaboration.

Despite these admitted facts, and the fact that discovery was barred by the District Court, the Second Circuit held in the All Funds Case, that 12 U.S.C. § 3403(a), is not applicable because Abuchaibe is not a "customer" of Banco Atlantico.

Abuchaibe argues that liability does exist under the Right to Financial Privacy Act not only because Banco Atlantico admitted that they placed the intercepted electronic fund transfers in a "stop que" account in their computer storage;[22] but also because Banco Atl-

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[22]The accounts had to be setup in accordance with the regulations of the Fedwire, SWIFT, and CHIPS systems. Said regulations requires that each electronic funds transfer which is delayed be maintained in a separate and distinct account apart from all others transfers. Also the spurious inference in the Second Circuit's opinion that the Limited Partnerships are not "partner-

antico was compensated for the expenses relating to their collaboration under the Right to Financial Privacy Act.

Because of the above admissions this Court should grant this Petition for Writ of Certiorari so to reverse the Second Circuit.

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ships" for purposes of the act disregards the Republic of Colombia Civil Code, and Section 101(7) of the Uniform Limited Partnership Act.

CONCLUSION

Through the use of only verbal telephone orders, the United States did knowingly procure the collaboration of Banco Atlantico, in the programming of "stop ques" in its communication computer modem devices, so to acquire access to the information in the in transit electronic funds transfer communications of Abuchaibe, and disclose Abuchaibe's electronic communication information in computer storage.

Because these activities violated the protection given by Congress to "electronic communications" and "financial information," the Second Circuit's holding that the electronic communications were forfeitable, and its denying the claim for damages, must be reversed.

The Second Circuit's decision has not only serious factual errors, but more disturbingly it is drafted to disregard totally the precise statutory language Congress enacted in 1986 to protect electronic communications:

- o 18 U.S.C. § 2510(4) and (5);
- o 18 U.S.C. § 2516(3);
- o 18 U.S.C. § 2511(1)(a) and (c);
- o 18 U.S.C. § 2511(3)(a);
- o 18 U.S.C. § 2703(a); and,
- o 12 U.S.C. § 3403(a).

This willingness of the Second Circuit to look the other way because citizens of the Republic of Colombia are involved despite the repeated admitted violations of federal statutes, brings to mind the following colloquy that has been attributed to the great Chancellor, Sir Thomas More:

Roper: So! Now you give the Devil benefit of law!

More: Yes. What would you do, cut a great road through the law to get after the Devil?

Roper: Yes! I'd cut down every law in England to do that!

More: Oh? And when the last law was down and the Devil turned round on you, where would you hide, Roper, the laws all being flat?

* * *

Yes, I give the Devil benefit of law for my own safety's sake.

Robert Bolt, "A Man for All Season."

Whether or not the words be the historical More's or only the playwright's, the insight is both profound, and serves as the foundation for requesting this Court to issue a writ of certiorari to the Second Circuit.

The two appeals must be reviewed by this Court not only to reverse the lower courts so to rein in their misguided en-

thusiasm to use the forfeiture laws to hack that great road through precise legislation recently enacted by Congress to protect electronic communications, the Fourth and Eighth Amendments; but also to provide supervisory guidance to the federal courts in the enforcement of the Electronic Communication Privacy Act and the Right to Financial Privacy Act.

Respectfully submitted,

Abuchaibe Hnos. Ltda.

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